A **TAN SRI DATUK PADUKA (DR) TING PEK KHIING**

v.

HU CHANG PEE

B COURT OF APPEAL, PUTRAJAYA
ZALEHA ZAHARI JCA
RAMLY ALI JCA
KANG HWEE GEE JCA
[CIVIL APPEAL NO: Q-02-12-08]
C 3 NOVEMBER 2010

CIVIL PROCEDURE: *Action - Claim for moneys owing - Plaintiff's claim for return of fees paid to defendant upon defendant's failure to secure logging contract - Fees paid - Whether advanced by company and not*
D *plaintiff director in individual capacity - Failure by judge to consider relevant paragraphs in affidavits affirming suit should be instituted by company and not plaintiff - Propriety of suit instituted by plaintiff in the circumstances - Debts owed by plaintiff to defendant - Whether claim set off against debts owed*

E ***CONTRACT:*** *Claim for moneys owing - Plaintiff's claim for return of fees paid to defendant upon defendant's failure to secure logging contract - Fees paid - Whether advanced by company and not plaintiff director in individual capacity - Failure by judge to consider relevant paragraphs in*
F *affidavits affirming suit should be instituted by company and not plaintiff - Propriety of suit instituted by plaintiff in the circumstances - Debts owed by plaintiff to defendant - Whether claim set off against debts owed*

CONTRACT: *Limitation - Conditional contract - Claim for return of fees paid upon failure to secure logging contract - Whether claim statute-*
G *barred - Limitation Ordinance (Cap. 49) Sarawak, s. 3*

CIVIL PROCEDURE: *Abuse of process - Action - Whether two actions on same facts - Whether constituted abuse*

H The defendant (appellant herein) appealed against the decision of the High Court allowing the claim by the plaintiff (respondent herein) against the defendant for the return of RM8.5 million which the plaintiff paid the defendant as fees to secure a logging contract of some 40,000 acres of land. The facts showed that the
I said parties were loggers and business associates. The plaintiff operated his business through his company called Interhill Enterprise Sdn Bhd ('Interhill Enterprise') of which he was a

director, and the defendant through his companies called the Equatorial Timber Marketing Sdn Bhd and the Equatorial Timber Holdings Sdn Bhd. The plaintiff paid the sum of RM8.5 million in cash on condition that it would be returned to the plaintiff in the event the defendant failed to secure the contract. It followed that the defendant failed to do so but did not return the sum of RM8.5 million as agreed. The plaintiff in his capacity as director of Interhill Enterprise filed a suit against the defendant for summary judgment but later withdrew the suit after filing the present suit in his personal capacity.

The defendant raised four grounds on appeal: (1) that the plaintiff's suit was statute-barred under s. 3 of the Limitation Ordinance (Cap. 49) Sarawak (2) that the present suit was an abuse of the court's process as the earlier suit instituted in the name of Interhill Enterprise was active before the High Court when the present suit was filed (3) that the learned judge fell into error in failing to consider two paragraphs in the relevant affidavits affirming that the RM8.5 million was advanced by Interhill Enterprise and therefore Interhill Enterprise should rightly make the claim against the defendant and not the plaintiff in his personal capacity, and (4) that the RM8.5 million was set-off against debts owed by the plaintiff to the defendant through logging business transactions and that the setting-off was in accordance with the custom, practice or understanding of the logging business community.

Held (dismissing the appeal)
Per Kang Hwee Gee JCA delivering the judgment of the court:

(1) The present suit which was filed on 22 October 1998 was well within the limitation period of three years from the date of the appellant's letter dated 22 December 1995 which had stated that the plaintiff's claim was set-off. (para 12)

(2) An incorporated company has a personality separate and distinct from its members. There could therefore be no question of the plaintiff in the present suit instituting two suits on the same claim. At worse, the present suit introduced into the arena of conflict another claimant against the defendant for the return of RM8.5 million. It did no harm to the defendant as he would be at liberty to raise a defence as he did in the present suit that the money was advanced to him

A by Interhill Enterprise and not the plaintiff. The two suits could have been consolidated at the case management stage but the parties did not do so. (para 13)

(3) Based on the notes of proceedings of the High Court in the B present suit, the omission of the learned judge to consider the relevant two paragraphs would not have influenced the outcome of the litigation for there were more compelling evidence that showed that the plaintiff did make the advance for himself and not for or on behalf of his company. (para 17)

C **(4)** A set-off is a claim by a defendant that the plaintiff owed him money which should be subtracted from the debt claimed by the plaintiff as at the date of the filing of the suit. However, since a company has a personality separate and distinct from its shareholders, it follows that the defendant cannot set-off D the debt owed to his company against the debt owed by him in his personal capacity. Further, the defendant failed to prove the existence of a custom, practice or understanding amongst the logging business community that allowed him to set-off his personal debt against the debt owed to his company (*Devonald* E *v. Rosser & Sons*; refd, *Chan Cheng Kum & Anor v. Wah Tat Bank Ltd & Anor*, foll). The 100 over documents that the defendant produced as proof of the set-off were disputed by the plaintiff and were at best, self-serving documentary hearsay. (paras 24-31)

F

Bahasa Malaysia *Translation Of Headnotes*

Defendan (perayu di sini) telah merayu terhadap keputusan Mahkamah Tinggi yang membenarkan tuntutan plaintif (responden G di sini) terhadap defendan untuk mengembalikan RM8.5 juta yang dibayar plaintif kepada defendan sebagai bayaran untuk memperoleh sebuah kontrak pembalakan berhubung lebih kurang 40,000 hektar tanah. Fakta kes menunjukkan bahawa plaintif dan defendan adalah pembalak-pembalak dan rakan-rakan perniagaan. H Plaintif menjalankan perniagaan melalui syarikatnya yang bernama Interhill Enterprise Sdn Bhd ('Interhill Enterprise') di mana plaintif ialah pengarahnya, manakala defendan menjalankan perniagaannya melalui syarikat-syarikatnya yang bernama Equatorial Timber Marketing Sdn Bhd dan Equatorial Timber Holdings Sdn Bhd. I Plaintif telah membayar RM8.5 juta wang tunai dengan syarat

bahawa wang tersebut akan dikembalikan jika defendan gagal memperoleh kontrak berkenaan. Ianya mengikut bahawa defendan gagal memperoleh sedemikian tetapi beliau tidak kembalikan RM8.5 juta tersebut seperti yang dijanjikan. Plaintif sebagai pengarah Interhill Enterprise memfailkan guaman terhadap defendan untuk penghakiman terus tetapi telah menarik balik guaman tersebut setelah memfailkan guaman semasa dalam kapasitinya sebagai seorang individu.

Defendan membangkitkan empat alasan rayuan: (1) bahawa guaman plaintif digalang statut di bawah s. 3 Limitation Ordinance (Cap. 49) Sarawak (2) bahawa guaman semasa adalah satu salah proses mahkamah disebabkan guaman sebelum yang dimulakan di bawah nama Interhill Enterprise adalah aktif di Mahkamah Tinggi semasa guaman semasa difailkan (3) bahawa hakim bicara terkhilaf apabila gagal mempertimbangkan dua perenggan dalam afidavit-afidavit berkenaan mengesahkan yang RM8.5 juta tersebut telah diberikan oleh Interhill Enterprise dan dengan itu Interhill Enterprise sepatutnya membuat tuntutan terhadap defendan dan bukan plaintif sebagai individu, dan (4) bahawa RM8.5 million tersebut telah ditolak daripada hutang plaintif kepada defendan berkaitan transaksi perniagaan pembalakan dan tolakan tersebut mengikut adat, praktis atau pemahaman komuniti perniagaan pembalakan.

Diputuskan (menolak rayuan)
Oleh Kang Hwee Gee HMR menyampaikan penghakiman mahkamah:

(1) Guaman semasa yang difailkan pada 22 Oktober 1998 adalah dalam masa had tiga tahun dari tarikh surat defendan bertarikh 22 Disember 1995 yang telah mendakwa bahawa tuntutan plaintif telah ditolak daripada hutang plaintiff kepada defendan.

(2) Sebuah syarikat perbadanan mempunyai keperibadian yang terasing dan ternyata daripada ahli-ahlinya. Maka tiada persoalan bahawa plaintif dalam kes semasa telah memulakan dua guaman atas tuntutan yang sama. Seteruknya pun, dalam arena konflik ini, guaman semasa telah mengemukakan pihak penuntut yang lain terhadap defendan atas pengembalian RM8.5 juta tersebut. Tiada prejudis kepada defendan kerana dia bebas untuk membangkitkan pembelaan sama seperti dalam

kes semasa iaitu wang berkenaan diberikan kepadanya oleh Interhill Enterprise dan bukan oleh plaintif. Selain itu, kedua guaman tersebut yang boleh disatukan pada tahap pengurusan kes tidak dibuat demikian oleh pihak-pihak guaman.

(3) Berdasarkan nota prosiding Mahkamah Tinggi guaman semasa, ketinggalan hakim yang arif mempertimbangkan dua perenggan terlibat tidak akan mempengaruhi kesudahan litigasi oleh kerana terdapatnya keterangan yang lebih menyakinkan yang menunjukkan bahawa plaintif telah memberikan wang berkenaan atas dirinya sendiri dan bukan atas pihak syarikatnya.

(4) Sesuatu tolakan ialah tuntutan defendan bahawa hutang plaintif kepadanya mesti ditolak daripada hutangnya kepada plaintif pada tarikh pemfailan guaman. Tetapi oleh kerana sebuah syarikat mempunyai keperibadian yang terasing dan ternyata daripada pemegang-pemegang syernya, ianya mengikut bahawa defendan tidak boleh membuat tolakan hutang peribadinya kepada plaintif daripada hutang plaintif kepada syarikatnya. Tambahan lagi, defendan gagal membuktikan bahawa adanya adat, praktis atau pemahaman di antara komuniti perniagaan pembalakan yang membenarkannya membuat demikian (*Devonald v. Rosser & Sons*; dirujuk, *Chan Cheng Kum & Anor v. Wah Tat Bank Ltd & Anor*, diikuti). Dokumen seratus lebih itu yang defendan mengemukakan sebagai bukti penolakan adalah dipertikaikan oleh plaintif dan selebihnya merupakan dokumentar dengar cakap tersendiri.

Case(s) referred to:

*Boonsoom Boonyanit v. Adorna Properties Sdn Bhd [1997] 3 CLJ 17 CA **(refd)***

*Chan Cheng Kum & Anor v. Wah Tat Bank Ltd & Anor [1971] 1 LNS 16 PC **(refd)***

Legislation referred to:

Evidence Act 1950, s. 34

Limitation Ordinance (Cap 49) (Sarawak), s. 3, Sch. item 78

For the appellant - Datuk Seri Muhammad Shafee Abdullah (Bong Ah Loi & Victor Wong Lit Fah with him); M/s Suhaili & Bong

For the respondent - Lim Heng Choo; M/s Lim & Lim

[Appeal from High Court, Sabah & Sarawak, Miri; No: 22-139-98(MR)]

Reported by Usha Thiagarajah

JUDGMENT

Kang Hwee Gee JCA:

[1] The plaintiff's claim against the defendant is for the return of the sum of RM8.5 million which he paid to the defendant as fees to secure for him a logging contract in a logging concession of some 40,000 acres at an area adjacent to the Lanjak Entimau Timber Concession Area in Sarawak.

[2] The High Court at Miri found for the plaintiff and hence this appeal.

[3] The plaintiff and the defendant were loggers and were business associates. Their relationship dated back to the 1970s when the plaintiff started to purchase logs from the defendant. The plaintiff operated his business mainly through his company Interhill Enterprise Sdn Bhd of which he was a director; and the defendant through his companies Equatorial Timber Marketing Sdn Bhd and Equatorial Timber Holdings Sdn Bhd.

[4] It is not in dispute that sometime in June 1991 the plaintiff had met the defendant in Singapore when the defendant agreed to obtain a logging contract for the plaintiff to log in a concession of some 40,000 acres at an area adjacent to the Lanjak Entimau Timber Concession Area in Sarawak. The plaintiff had paid the sum of RM8.5 million in cash as brokerage to the defendant on condition that the same would be returned to the plaintiff in the event that the defendant failed to obtain the contract. This is clear from the pleadings itself.

[5] The defendant failed to obtain the contract but did not return the sum of RM8.5 million. The plaintiff then in his capacity as director of his family company Interhill Enterprise Sdn Bhd filed Miri Suit No. MR-22-18-1996 against the defendant, in the course of which Interhill Enterprise Sdn Bhd initiated an application for summary judgment under O. 14. The application was still pending before the court when Interhill Enterprise Sdn Bhd withdrew the suit MR-22-18-1996 on 20 May 2010.

[6] The plaintiff then decided to file the instant action in his personal capacity.

The Grounds

[7] The four grounds raised at the High Court below were raised before us in this appeal.

[8] First - that the plaintiff's action was statute-barred under s. 3 of the Limitation Ordinance (Cap. 49 of Sarawak) the claim having been instituted outside the period of limitation provided therein.

[9] Second - that the present action is an abuse of the process of the court given that a suit on the same factual matrix had been instituted in the name of Interhill Enterprise Sdn Bhd, a company of which the plaintiff was the director, against the defendant at the court. The previous action was still active before the High Court when the present action was filed.

[10] Third - that the sum claimed was in fact advanced to the defendant by Interhill Enterprise Sdn Bhd whose legal existence was independent and separate from its officers, directors, and shareholders. The evidence it is submitted, points conclusively to the fact that the money was paid to the defendant by the plaintiff for and on behalf of his company Interhill Enterprise Sdn Bhd and under the circumstances only Interhill Enterprise Sdn Bhd can make a claim and not the plaintiff in his individual capacity.

[11] Fourth - that the sum of RM8.5 million claimed by the plaintiff had been set off against debts owed to the defendant by the plaintiff through a series of transactions in the course of their logging business in accordance with the understanding and practice among members of the logging business community to which they both belonged. The practice and understanding in so far as it can be understood from the evidence of the defendant, allow them to mix their personal business dealings with dealings of companies which they owned with the liberty to set off personal debts against debts owed to their companies. The defendant claimed that the plaintiff's claim of RM8.5 million had been set off in this manner by:

(a) Payment on the 11/4/1994	RM3,000,000.00
(b) Debit note ETM/DN/94-266	RM1,400,000.00
(c) Debit note for monthly log produce for timber area held under Timber Licence No. T/0329, No. T/0339 and No. T/0340 from March 1994 to December 1994	RM 5,752,665.82
	RM10,165,655.82 (sic)

The First Ground - On Limitation

[12] This was not seriously pursued as it was abundantly clear that the present suit was filed on 22 October 1998 well within the limitation period of three years from the date of the defendant's letter dated 22 December 1995 as set in Item 78 of Schedule to the Limitation Ordinance of Sarawak.

The Second Ground - Whether There Was An Abuse Of Process

[13] Whereas the Miri High Court Suit No. MR-22-18-1996 was filed by Interhill Enterprise Sdn Bhd, the instant suit was by the plaintiff Hu Chang Pee in his personal capacity. An incorporated company has a personality separate and distinct from its members. There could therefore be no question of the plaintiff Hu Chang Pee in the instant suit instituting two suits on the same claim. At worse, the instant suit introduced into the arena of conflict, another claimant against the defendant for the return of the sum of RM8.5 million. It did no harm to the defendant as he would be at liberty to raise a defence (as he did) in this suit that the money was advanced to him by Interhill Enterprise Sdn Bhd and not Hu Chang Pee. The two suits could have been consolidated at the case management stage, but the parties did not do so.

The Third Ground - Whether The Judge Fell Into Error

[14] In the earlier suit filed by Interhill Enterprise Sdn Bhd against the defendant, the plaintiff in his capacity as a director of Interhill Enterprise Sdn Bhd in an O. 14 application for summary judgment deposed two affidavits in which he had admitted that the money was in fact advanced by his company Interhill Enterprise Sdn Bhd. It was contended that the learned judge had fallen into error in failing to consider the following evidence in favour of the defence:

(i) at para. 5 of his affidavit in support wherein he deposed: Pursuant to the aforesaid arrangement the plaintiff (Interhill) duly paid the said sum of Malaysian Ringgit RM8,500,000 to the defendant (the present appellant) in staggered payments between 12 August 1991 and 23 September 1991; and

(ii) at para. 6 of his affidavit in reply, (in answer to para. 2(h) of Ting's Supplementary Affidavit in Opposition) wherein he deposed "I assert that the RM8.5 million was advanced by the plaintiff (Interhill) and is owed to the plaintiff (Interhill)."

[15] We examined the notes of proceedings of the High Court in the present action. Uppermost in our mind is the established principle alluded to by Gopal Sri Ram JCA (as he then was) in *Boonsoom Boonyanit v. Adorna Properties Sdn Bhd* [1997] 3 CLJ 17 that:

> ... a trier of fact, in order to arrive at a decision according to law, must judicially appreciate the evidence led before him upon the issue called for resolution. A decision arrived in the absence of a judicial appreciation of evidence is liable to appellate correction. Judicial appreciation is concerned with the process of evaluating the evidence for the purpose of discovering where the truth lies in a particular case. It includes, but is not limited to, identifying the nature and quality of the evidence, assigning such weight to it as the trier of fact deems appropriate, testing the credibility of oral evidence against contemporaneous documents as well as the probabilities of the case and assessing the demeanour of witnesses.

[16] We also reminded ourselves of the overriding principle that in undertaking the task before him a judge has always been afforded the latitude to arrive at his own findings of fact and that a party complaining of the omission of the judge to consider a point in his favour must be able to convince the appellate court that the omission was so critical that it would have affected the outcome of the litigation.

[17] Having examined the notes of proceedings of the High Court in the present action, we are convinced that the omission of the learned judge to consider the two paragraphs referred to earlier would not have influenced the outcome of the litigation, for there were other more compelling evidence that the plaintiff had made the advance for himself and not for and on behalf of his company or companies. They were to be found in the letter which the plaintiff wrote to the defendant and the reply he received from the defendant's solicitors.

[18] The plaintiff's letter read as follows: A

Our Ref: IE/M/447/95
Date: 6 December 1995 AR REGISTERED

Tan Sri Ting Pek Khiing
Equatorial Timber Marketing Sdn Bhd B
No. I Jalan Padungan
Bandaraya Kuching Utara
P.O. Box 2939
93758 Kuching.

Dear Tan Sri C

Re: Sums Of Monies Advanced To You

I write in respect of various sums of monies that I have advanced/paid to you over the past few years. Since my oral attempts to speak to you regarding such payments has failed to produce any satisfactory result, I am constrained to write to you. D

You will recall, I met you at the Holiday Inn, Singapore in 1991. You informed me that for a fee of RM8.5 Million, you could secure a timber main-contract for my company, in respect of a timber concession of some 40,000 odd acres adjacent to Lanjak Entimau concession. E

Pursuant to our conversation and the agreement that we reached, I caused to be paid to you a sum of money in both Malaysian and Singapore currency amounting to RM8.5 Million on the understanding and upon your undertaking that you would return the said money if you failed to secure such a main-contract. No time period was fixed and I appreciate that it can take a very long time to secure such a main-contract. You repeatedly assured me each time I reminded you over the past years that you were still working on it and asked me to wait. F G

The last time you told me to wait was in last year, 1994. I know that you have been working on obtaining the main-contract since then, as you assured me you were doing so.

However, thinking the matter over, I do not wish to proceed any further with our arrangement. I do not want the main-contract anymore. H

Therefore, I will appreciate if you could return the RM8.5 Million to me soonest. I

I look forward to hearing from you soon.

Yours faithfully
for Interhill Enterprise Sdn Bhd

[19] The reply from the defendant's solicitors Victor Wong & Chiew dated 22 December 1995 in response to the plaintiff's letter read:

Your Ref: IE/M/447/95 & IE/M/448/95

22nd December, 1995 AR REGISTERED

Mr. Hii Chang Pee,
Interhill Enterprise Sendirian Berhad,
Lot 960, Piasau Industrial Area,
Jalan Bulatan,
P.O. Box 1200/1559,
98008 Miri.

Dear Sir,

Re: Tan Sri Datuk Ting Pek Khiing
Your Claim For Sums Advanced
Tan Sri's Claim For Sums Due

We act for and on behalf of Tan Sri Datuk Ting Pek Khiing of Equatorial Timber Marketing Sendirian Berhad, of P.O. Box 2939, 93758 Kuching in respect of the above stated matters.

Your two letters with the above-stated reference dated 6th and 8th December, 1995 respectively and addressed to Tan Sri have been given to us with instructions to reply thereto.

In respect of the RM8.5 million paid by you to Tan Sri on the matter of the timber concession of some 40,000 acres, we are to say that Tan Sri will make refund of the same.

In respect of the Singapore Dollars 3,580,000.00 paid by you on the matter of the transfer of Timber Licence No.T/3157, we are to say with regret that your request for the refund of this sum cannot be entertained.

We are to say that the transfer of the said Timber Licence could not be successfully carried out due to actions on your part amounting to criminal offence directly affecting the said Timber Licence. Your actions were directly and solely the cause of the cancellation of the said Timber Licence by the relevant authority. You will appreciate that in these circumstances, refund of the Singapore Dollars 3,580,000.00 cannot be made.

The Tan Sri on his part have caused to be paid, credited and/or claimed to and from you the following sums of money:

i. By HHBB cheque No. 217679 KCH		RM3,000,000.00
ii. Debit Note ETM/DN/94-266 of 31/10/1994		RM1,400,000.00
iii. Monthly deduction for log production at areas under T0339, T0340 and T0329 on Account		RM10,012,704.77
	Total:	RM10,012,704.77

So in respect of your claim for RM8.5 Million, this amount of RM10,012,704.77 due from you to the Tan Sri will more than settle your claim.

We are to request that you effect settlement of the balance of RM1,512,704.77 as soon as possible.

We are further instructed that you took over the Timber concession under Licence T/0329 on the express undertaking to pay to Tan Sri a sum of RM16 Million. To date, you have paid a total of RM4 Million against this debt, leaving a balance of RM12 Million. We are to request that you make immediate arrangement to settle this outstanding sum of RM12 Million in full.

Please by your prompt reply inform us or the Tan Sri of your arrangement to fully pay and settle the two outstanding sums set out above. We will appreciate your kind assistance in this matter.

Yours faithfully,
Victor Wong & Chiew

Sgd.

...
VW/cp

c.c. Tan Sri Datuk Ting Pek Khiing

[20] The admission, we observed, was consistent with the statement he made in his affidavit in reply affirmed on 3 December 1996 to oppose the plaintiff's application for summary judgment under O. 14 in the Miri Suit No. MR-22-18-1996 *Interhill Enterprise Sdn Bhd v. Tan Sri Datuk Ting Pek Khiing*, at para. 4(a) wherein he attempted to counter the plaintiff's claim that the money was advanced by Interhill Enterprise Sdn Bhd by deposing that "the RM8.5 million was advanced by Hii in Singapore and Malaysian currency and not by the plaintiff (Interhill) as alleged."

[21] The learned High Court judge accepted the documents as clear proof that the plaintiff was acting for himself. We accept his reasoning and find no reason to disagree with his finding on this issue.

The Fourth Ground - The Set-off

[22] The only issue of substance that we need to consider in this appeal in our view, is whether the sum of RM8.5 million had been set off against the mutual debts of the parties in the way described by the defendant.

[23] First it is necessary to consider whether the defendant may set off his personal debt against debts owed to his companies.

[24] A set-off is essentially a claim by a defendant that the plaintiff had owed him money which should be subtracted from the debt being claimed by plaintiff as at the date of the filing of the suit when the mutual debts would have to be squared up.

[25] But as a company has a personality separate and distinct from its shareholders, it follows therefore the defendant cannot set off the debt owed to his company against the debt owed by him in his personal capacity.

[26] To sustain his claim that the custom practised among the logging business community to which they both belonged allowed him to set off his personal debt against debt owed to his company the defendant would have to prove that the custom was "notorious, certain and reasonable and does not offend against the intention of any legislative enactment." (*Devonald v. Rosser & Sons* [1906] 2 KB 728, 743.)

[27] We would adopt what Lord Devlin said in *Chan Cheng Kum & Anor v. Wah Tat Bank Ltd & Anor* [1971] 1 LNS 16 Privy Council (Lord Upjohn, Lord Devlin & Lord Pearson) with respect to what is required to be proved to establish the existence of custom of merchants generally:

> Universality, as a requirement of custom, raises not a question of law but a question of fact. There must be proof in the first place that the custom is generally accepted by those who habitually do business in the trade or market concerned. Moreover, the custom must be so generally known that an outsider who makes reasonable enquiries could not fail to be made aware of it. The size of the market or the extent of the trade affected is neither here nor there. It does not matter that the custom alleged in this

> case applies only to part of the shipping trade within the State of Singapore, so long as the part can be ascertained with certainty, as it can here, as the carriage of goods by sea between Sarawak and Singapore. A good and established custom "obtains the force of a law, and is, in effect, the common law within that place to which it extends": *Lockwood v. Wood* [1844] 6 QB 50, 115 ER 19, per Tindal CJ at p. 64. Thus the custom in this case, if proved, takes effect as part of the common law of Singapore. As such it will be applied by any court dealing with any matter which that court treats as governed by the law of Singapore. In this sense it is binding not only in Singapore but on anyone anywhere in the world.

[28] The defendant offered no such evidence of the existence of such a custom or practice and understanding.

[29] But even assuming that such a custom or practice and understanding in the logging business community is proved, it is clear that the defendant had failed to prove any such set-offs.

[30] As proof of the set-off all that the defendant did was to produce a stack of over 100 documents consisting of copies of payment vouchers, credit and debit notes accompanied by a summary of payments made by his company Equatorial Timber Marketing Sdn Bhd to the plaintiff's company between June 1995 and February 1998, statement of payments for the purchase of logs by the plaintiff's company Interhill Enterprise Sdn Bhd from the defendant's company Equatorial Timber Marketing Sdn Bhd for 1997 and for January and February 1998.

[31] The documents were disputed by the plaintiff and were therefore at best, self serving documentary hearsay. Even assuming they can be proved to be entries in the books of accounts regularly kept in the course of business of the defendant's companies, under s. 34 of the Evidence Act 1950, they were insufficient without more, "to charge any person with liability".

[32] For the foregoing reasons we affirm the decision of the High Court and dismiss the appeal with costs

[33] Both Justice Zaleha Zahari and Justice Ramly bin Haji Ali have read the draft of this judgment and have agreed with the contents therein.